



## **DEPARTMENT OF DEFENSE**

### **Office of the Secretary**

**[Docket ID: DoD-2023-OS-0009]**

### **U.S. Court of Appeals for the Armed Forces Proposed Rules Changes**

**AGENCY:** Office of the Secretary, Department of Defense.

**ACTION:** Notice of proposed changes to the rules of practice and procedure of the United States Court of Appeals for the Armed Forces.

**SUMMARY:** This notice announces proposed changes to the Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces. Although these rules of practice and procedure fall within the Administrative Procedure Act's exemptions for notice and comment, the Department, as a matter of policy, has decided to make these changes available for public review and comment before they are implemented.

**DATES:** Comments on the proposed changes must be received by [INSERT 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by docket number and title by any of the following methods:

- *Federal eRulemaking Portal*: <http://www.regulations.gov>.
- *Mail*: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350-1700.

*Instructions*: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT**: Malcolm H. Squires, Jr., Clerk of the Court, telephone (202) 761-1448.

**SUPPLEMENTARY INFORMATION**: This notice announces the following proposed changes to Rules 3A, 13(b), 13A, 15(b), 19(a)(7)(B), 21, 24(b), 27(b), 36, 37(b)(2), 38(a), 39(a) and the Guidelines for Electronic Filing of Pleadings of the Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces.

Dated: January 20, 2023.

**Aaron T. Siegel,**

*Alternate OSD Federal Liaison Officer, Department of Defense.*

**Rule 3A:**

*Rule 3A – Senior Judges – currently reads:*

(a) With the Senior Judge's consent, and at the request of the Chief Judge, a Senior Judge may perform judicial duties with the Court if an active Judge of the Court is disabled or recused himself or if there is a vacancy in an active judgeship on the Court. For the periods of time when performing judicial duties with the Court, a Senior Judge shall receive the same pay, per diem, and travel allowances as an active Judge. The periods of performance of judicial duties shall be certified by the Chief Judge and reported to the Court Executive who shall

take appropriate steps so that the Senior Judge is paid in accordance with Article 142(e)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. 942(e)(2).

(b) In addition to the performance of judicial duties with the Court, a Senior Judge may, at the request of the Chief Judge and with the Senior Judge's consent, perform such other duties as the Chief Judge may request or the Court may direct. Such other duties may include, but are not limited to, service as a special master or as an adviser on Court operations, administration, and rules; representation of the Court at conferences, seminars, committee meetings, or other official or professional functions; coordination of or assistance with conferences being conducted by the Court; and assistance in the compilation of history or archives of the Court. A Senior Judge shall not receive pay for the performance of such other duties with the Court but may be paid per diem and travel allowance to reimburse expenses incurred by the Senior Judge while performing such duties.

(c) Whether in the performance of judicial duties or other duties, a Senior Judge shall be provided such administrative and secretarial assistance, office space, and access to the courthouse, other public buildings, court files, and related information, as the Chief Judge considers appropriate for the performance of those duties by the Senior Judge.

(d) The title of Senior Judge may not be used in any way for personal gain or in connection with any business activity, advertisement, or solicitation of funds. However, the title of a Senior Judge may be referred to in any professional biography or listing and may be used in connection with any judicial or other duties that the Chief Judge requests the Senior Judge to perform.

(e) No Senior Judge of the Court may engage in the practice of law in connection with any matter that involves an investigation or trial for any matter arising under the UCMJ or appellate review of any court-martial proceeding by a Court of Criminal Appeals, the United States Court of Appeals for the Armed Forces, or the Supreme Court of the United States.

(f) These rules shall apply to "senior judges" as defined by Article 142(e)(1), UCMJ, 10 U.S.C. 942(e)(1), and are promulgated pursuant to Article 142(e)(5), UCMJ, 10 U.S.C. 942(e)(5).

*The proposed change to Rule 3A would read:*

(a) With the Senior Judge's consent, and at the request of the Chief Judge, a Senior Judge may perform judicial duties with the Court if an active Judge of the Court is disabled or recused, or if there is a vacancy in an active judgeship on the Court. For the periods of time when performing judicial duties with the

Court, a Senior Judge shall receive the same pay, per diem, and travel allowances as an active Judge. The periods of performance of judicial duties shall be certified by the Chief Judge and reported to the Clerk of the Court who shall take appropriate steps so that the Senior Judge is paid in accordance with Article 142(e)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. 942(e)(2).

(b) In addition to the performance of judicial duties with the Court, a Senior Judge may, at the request of the Chief Judge and with the Senior Judge's consent, perform such other duties as the Chief Judge may request or the Court may direct. Such other duties may include, but are not limited to, service as a special master or as an adviser on Court operations, administration, and rules; representation of the Court at conferences, seminars, committee meetings, or other official or professional functions; coordination of or assistance with conferences being conducted by the Court; and assistance in the compilation of history or archives of the Court. A Senior Judge may not receive pay for the performance of such other duties with the Court but may be paid per diem and travel allowance to reimburse expenses incurred by the Senior Judge while performing such duties.

(c) The title of Senior Judge may not be used in any way for personal gain or in connection with any business activity, advertisement, or solicitation of funds. However, the title of a Senior Judge may be referred to in any professional biography or listing and may be used in connection with any judicial or other duties that the Chief Judge requests the Senior Judge to perform.

(d) No Senior Judge of the Court may engage in the practice of law in connection with any matter that involves an investigation or trial for any matter arising under the UCMJ or appellate review of any court-martial proceeding by a Court of Criminal Appeals, the United States Court of Appeals for the Armed Forces, or the Supreme Court of the United States.

(e) These rules shall apply to "senior judges" as defined by Article 142(e)(1), UCMJ, 10 U.S.C. 942(e)(1), and are promulgated pursuant to Article 142(e)(5), UCMJ, 10 U.S.C. 942(e)(5).

Comment: Article 142(e)(5), UCMJ, requires that our Court "prescribe rules for the use and conduct of senior judges..." (emphasis supplied). The proposed revision removes the language regarding the support and amenities provided to senior judges, which is repetitive of Article 142(e)(3), UCMJ, and NOT required by Article 142(e)(5). The Court has not employed a Court Executive for some time and the position's workload has largely been delegated to the Clerk of the Court.

## **Rules 13(b):**

*Rules 13(b) – Qualifications to Practice – currently reads:*

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(b) It shall be a requisite to the admission of attorneys to the Bar of this Court that they be a member of the Bar of a federal court or of the highest court of a State, Territory, Commonwealth, or Possession, and that their private and professional character shall appear to be good.

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*The proposed change to Rule 13(b) would read:*

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(b) It shall be a requisite to the admission of attorneys to the Bar of this Court that they be a member in good standing of the Bar of the highest court of a State, the District of Columbia, Territory, Commonwealth, or Possession of the United States.

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Comment: Most federal courts are not bar licensing authorities. Limiting the requirement to “the Bar of a State, the District of Columbia, Territory, Commonwealth, or Possession of the United States” will allow the Court to know the applicant’s standing because these bars are licensing authorities and are notified of suspected or actual misconduct.

## **Rule 13A:**

*Rule 13A – Student Practice Rule – currently reads:*

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(c) Supervising Attorney Requirements. A supervising attorney must:

- (1) be an attorney of record in the case;
- (2) be a member in good standing of the Bar of this Court;
- (3) have been admitted to practice for a minimum of 2 years and have appeared and argued in at least 1 case before this Court or appeared and argued in at least 3 cases before state or federal appellate courts;
- (4) not supervise more than 5 students at any one time;
- (5) appear with the student in any oral presentations before this Court;
- (6) read, approve, and sign all documents filed with this Court;

- (7) assume personal professional responsibility for the student's work in matters before this Court;
- (8) be responsible to supplement the oral or written work of the student as necessary to ensure proper representation of the client;
- (9) guide and assist the student in preparation to the extent necessary or appropriate under the circumstances;
- (10) be available to consult with the client; and
- (11) neither ask for nor receive any compensation or remuneration of any kind from the person on whose behalf the services are rendered.

(d) Authorization and Certification.

- (1) The party on whose behalf the student appears must consent to the representation by that student in writing.
- (2) The supervising attorney must indicate in writing approval of the appearance by the law student and consent to supervise the student.
- (3) The law student must be certified by the dean of the student's law school as being of good character and competent legal ability.
- (4) Before commencing student representation in any case under this rule, the supervising attorney shall file a motion for leave to allow student representation in such case. The motion should put forth that the provisions of this rule have been met and that in counsel's view the case is an appropriate one for student representation. The written consent, approval, and certification referred to above shall be attached to the motion. A copy of the motion shall be served on opposing counsel, but no answer will be allowed except with leave of the Court. Once these documents are filed, the Court will decide, using its discretion on a case-by-case basis, whether to allow the student representation.

(e) Activities. Upon fulfilling the requirements of this rule, the student may enter an appearance in a case and:

- (1) assist in the preparation of briefs and other documents to be filed in this Court, but such briefs or documents must also be signed by the supervising attorney;
- (2) participate in oral argument, but only in the presence of the supervising attorney; and

(3) take part in other activities in connection with the case, subject to the direction of the supervising attorney.

(f) Termination. The dean's certification of the student:

(1) shall remain in effect, unless sooner withdrawn, until the publication of the results of the first bar examination taken by such student following the student's graduation. For any student who passes that examination, the certification shall continue in effect until the date the student is admitted to the bar;

(2) may be withdrawn by the Court at any time; and

(3) may be withdrawn by the dean at any time.

(g) Exceptions.

(1) This rule does not apply to an appearance or an oral argument by a law student on behalf of an amicus curiae. *See* Rule 26.

(2) Nothing in this rule shall preclude the Government or any agency, firm, or organization from compensating a law student for services rendered under such rule.

(3) The Court retains the authority, on good cause shown, to establish exceptions to these procedures in any case. *See* Rule 33.

(h) Time for Filing. An amicus brief submitted under this Rule is not subject to the time limitation in Rule 26, but such brief shall be filed no less than 14 days before the scheduled date of oral argument. Both the appellant and the appellee may file a reply to such brief within 7 days of the filing thereof, subject to the limitations specified in Rule 24 (b) and (c).

*The proposed change to Rule 13A would read:*

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(c) Supervising Attorney Requirements. A supervising attorney must:

(1) be an attorney of record in the case;

(2) be a member in good standing of the Bar of this Court;

(3) have been admitted to practice for a minimum of 2 years and have argued at least 1 case before this Court or argued at least 3 cases before state or federal appellate courts;

(4) approve in writing the appearance by the law student and agree to supervise the student;



- (5) not supervise more than 5 students at any one time;
- (6) appear with the student in any oral presentations before this Court;
- (7) read, approve, and sign all documents filed with this Court;
- (8) assume personal professional responsibility for the student's work in matters before this Court;
- (9) be available to consult with the client, if applicable; and
- (10) neither ask for nor receive any compensation or remuneration of any kind from the person on whose behalf the services are rendered.

(d) Authorization and Certification.

- (1) The party on whose behalf the student appears must consent to the representation by that student in writing.
- (2) Before commencing student representation in any case under this rule, the prospective supervising attorney must file a motion for leave to allow student representation in such case. The motion must affirm that the provisions of this rule have been met and that, in the prospective counsel's view, the case is an appropriate one for student representation. The written consent, approval, and certification referred to above shall be attached to the motion. No answer will be allowed except with leave of the Court. Once these documents are filed, the Court will decide, using its discretion on a case-by-case basis, whether to allow the student representation.

(e) Activities. Upon fulfilling the requirements of this rule, the student may enter an appearance in a case and:

- (1) assist in the preparation of briefs and other documents to be filed in this Court; and
- (2) participate in oral argument, but only in the presence of the supervising attorney.

(f) Exceptions.

- (1) Nothing in this rule shall preclude the Government or any agency, firm, or organization from compensating a law student for services rendered under such rule.

(2) The Court retains the authority, on good cause shown, to establish exceptions to these procedures in any case. *See* Rule 33.

Comment: The student practitioner rule should make no distinction based on the route a student takes to participate in a case—whether through some type of internship, externship, or through Project Outreach. The nature of the Court’s Project Outreach visit may make meeting the standard requirements for filing briefs unworkable. However, no rigid timeline or word limitation need be spelled out, as this can be overcome by granting exceptions through what would become Rule 13A(f)(2).

**Rule 15(b):**

*Rule 15(b) – Disbarment and Disciplinary Actions – currently reads:*

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(b) Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within 30 days, why a disbarment order should not be entered. Upon response, or if no response is timely filed, the Court will enter an appropriate order.

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*The proposed change to Rule 15(b) would read:*

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(b) Attorneys must report suspension, disbarment, or final disciplinary action in the bars of other courts to the Bar of this Court within 30 days following said action. Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, the Court must enter an order temporarily suspending that member from practice before this Court and affording the member an opportunity to show cause, within 30 days, why a disbarment order should not be entered. Upon response, or if no response is timely filed, the Court will enter an appropriate order.

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Comment: There was no previously existing requirement for attorneys to update this Court of any suspension, disbarment, or final disciplinary action in the bars of other courts. Adding this language will allow this Court to take appropriate action to maintain the integrity of its bar.

**Rule 19(a)(7)(B):**

*Rule 19(a)(7)(B) – Time Limits – currently reads:*

(a) Petition for Grant of Review / Supplement / Answer / Reply

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(7) Granted Petitions.

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(B) Other Appeals. Where a petition has been granted in all other appeal cases and briefs have been ordered, an appellant's brief shall be filed in accordance with Rule 24 no later than 30 days after the date of the order granting the petition. An appellee's answer shall be filed no later than 30 days after the filing of an appellant's brief. A reply may be filed by the appellant no later than 10 days after the filing of the appellee's answer.

*The proposed change to Rule 19(a)(7)(B) would read:*

(a) Petition for Grant of Review / Supplement / Answer / Reply

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(7) Granted Petitions.

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(B) Other Appeals. Where a petition has been granted in all other appeal cases, to include cases returned by mandate from the United States Supreme Court, the Clerk of Court will issue a briefing order within 30 days to provide the appropriate timing and sequence of filings.

Comment: Due to the uncertain nature of "other appeals" it is best to remove strict requirements on the order and timing of filings and to place them under the discretion of the Clerk of the Court.

## **Rule 21:**

*Rule 21 – Supplement to Petition for Grant of Review – currently reads:*

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(b) The supplement to the petition shall be filed in accordance with the applicable time limit set forth in Rule 19(a)(5)(A) or (B), shall include an Appendix containing a copy of the decision of the Court of Criminal Appeals, unpublished opinions cited in the brief, relevant extracts of rules

and regulations, and shall conform to the provisions of Rules 24(b), 35A, and 37. Unless authorized by Order of the Court or by motion of a party granted by the Court, the supplement and any answer thereto shall not exceed 25 pages, except that a supplement or answer containing no more than 9,000 words or 900 lines of text is also acceptable. Any reply to the answer shall not exceed 10 pages, except that a reply containing 4,000 words or 400 lines of text is also acceptable. The supplement shall contain:

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(f) An appellant or counsel for an appellant may move to withdraw his petition at any time by filing a motion pursuant to Rule 30. Such a motion shall substantially comply with the requirements of Rule for Courts-Martial 1110, and be accompanied by a written request for withdrawal that includes the following:

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*The proposed changes to Rules 21 would read:*

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(b) The supplement to the petition shall be filed in accordance with the applicable time limit set forth in Rule 19(a)(5) and shall include an Appendix containing a copy of the decision of the Court of Criminal Appeals, unpublished opinions cited in the brief, relevant extracts of rules and regulations, and shall conform to the provisions of Rules 35A and 37. Unless authorized by Order of the Court or by motion of a party granted by the Court, the supplement and any answer thereto may not exceed 9,000 words. Any reply to the answer may not exceed 4,500 words. The supplement shall contain:

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(f) An appellant may move to withdraw a petition at any time by filing a motion pursuant to Rule 30. Such a motion must be accompanied by a written request for withdrawal that includes the following:

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Comment: Rule 24(b) deals with the filing of briefs, and, as Rule 21 governs the supplement, all provisions governing the length of the supplement should remain in Rule 21(b). The page and lines of text requirements are removed to bring this Court in line with the trends of other federal courts. Both the Rules of the Supreme

Court and the Federal Rules of Appellate Procedure are deemphasizing page limitations and shifting focus to word counts. Presently, Rule 21(f) states that such a motion shall comply with R.C.M. 1110, along with other requirements specified in Rule 21(f)(1)-(3). The current version of R.C.M. 1110 does not address this subject. The 2019 M.C.M. does address petitions for withdrawal of appellate review in R.C.M. 1115, but not as to C.A.A.F., only as to the C.C.A.s.

## **Rule 24:**

*Rule 24(b) – Supplement to Petition for Grant of Review – currently reads:*

Rule 24(b) – Form, Content, and Page Limitations

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(b) Page Limitations. Unless otherwise authorized by order of the Court or by motion of a party granted by the Court (*see* Rule 30), or by Rule 24(c), the page limitations for briefs filed with the Court, not including appendices shall be as follows:

- (1) Briefs of the appellants/petitioners shall not exceed 30 pages;
- (2) Answers of the appellees/respondents shall not exceed 30 pages;
- (3) Replies of the appellants/petitioners shall not exceed 15

(c) Type-Volume Limitations.

- (1) A brief of the appellants/petitioners and an answer of the appellees/respondents is acceptable if:

it contains no more than 14,000 words; or  
it contains no more than 1,300 lines of text.

- (2) A reply is acceptable if it contains no more than half of the type-volume specified in Rule 24(c)(1).

(3) Headings, footnotes, and quotations count toward the word and line limitations. The index, table of cases, statutes, and other authorities, the appendix and any certificates of counsel do not count toward the limitation.

(d) Certificate of Compliance. A brief submitted under Rule 24(c) must include a certificate stating that the brief complies with the type-volume limitation and Rule 37. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either: (i) the number of words in the brief; or (ii) the number of lines in the brief.

(e) Form of Certificate of Compliance

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(b) because:

[The principal brief may not exceed 14,000 words or 1,300 lines; a reply or amicus brief may not exceed 7,000 words or 650 lines

This brief contains [state the number of] words.

\*\*\*

(f) Joint Appendix. The appellant or petitioner shall be responsible for filing eight copies of a joint appendix, which shall be a separate document filed contemporaneously with the brief.

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(2) Format. The joint appendix will be produced on 8.5 by 11 inch white paper, be bound in a manner that is secure and does not obscure the text, and will permit the contents to lie reasonably flat when open. The cover must be white and contain the caption of the case and docket number. The cover shall be followed by a table of contents. Pages in the joint appendix shall be sequentially numbered in a manner that does not obscure any page numbers reflected in the record of trial. If the joint appendix consists of less than 100 pages, it may be reproduced by single-sided or double-sided copying. If it consists of 100 pages or more, the joint appendix shall use double-sided copying. Classified material or matters under seal that are to be included in a joint appendix shall be submitted in a separate volume, clearly designated as containing classified or sealed material. Classified material will be handled in accordance with Rule 12.

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*The proposed change to Rule 24(b) would read:*

Rule 24(b) – Form, Content, and Type-Volume Limitations

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(b) Type-Volume limitations. Unless otherwise authorized by order of the court or by motion of a party granted by the Court (*see* Rule 30), or by Rule 24(c), the type-volume limitations for briefs filed with the Court, not including appendices shall be as follows:

(1) A brief of the appellants/petitioners and an answer of the appellees/respondents may not exceed 14,000 words.

(2) A reply may not exceed more than half of the words (7,000) specified in Rule 24(b)(1).

(3) Headings, footnotes, and quotations count toward the word limitation. The index, table of cases, statutes, and other authorities,

the appendix and any certificates of counsel do not count toward the limitation.

(c) Certificate of Compliance. A brief submitted under Rule 24(b) must include a certificate stating that the number of words in the brief complies with the type-volume limitation and Rule 37. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the brief. The certificate must state the number of words in the brief.

(d) Form of Certificate of Compliance.

CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

\*\*\*This brief complies with the type-volume limitation of Rule 24(b) because:

This brief contains [state the number of] words.

\*\*\*

(e) Joint Appendix. The appellant or petitioner shall be responsible for filing eight copies of a joint appendix, which shall be a separate document filed contemporaneously with the brief.

\*\*\*

(2) Format. The Joint Appendix will be produced on 8.5 by 11 inch white paper, be bound in a manner that is secure and does not obscure the text, and will permit the contents to lie reasonably flat when open. The cover must be white and contain the caption of the case and docket number. The cover shall be followed by a table of contents. Pages in the joint appendix shall be sequentially numbered in a manner that does not obscure any page numbers reflected in the record of trial. If the joint appendix consists of less than 100 pages, it may be reproduced by single-sided or double-sided copying. If it consists of 100 pages or more, the joint appendix shall use double-sided copying. Audio and video recordings may be filed electronically or produced on a CD or DVD. *See* the Guidelines for Electronic Filing of Pleadings § 1(e). Classified material or matters under seal that are to be included in a joint appendix shall be submitted in a separate volume, clearly designated as containing classified or sealed material. Classified material will be handled in accordance with Rule 12.

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Comment: The page and lines of text requirements are removed to bring this Court in line with the trends of other federal courts. Both the Rules of the Supreme Court and the Federal Rules of Appellate Procedure are deemphasizing page limitations and shifting focus to word counts. Additionally, stating a clear rule on the nature of audio and video filing will provide clarity to filers.

## **Rule 27(b):**

*Rule 27(b) – Petition for Extraordinary Relief, Writ-Appeal Petition, Answer, and Reply – currently reads:*

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(b) Writ-Appeal Petition, Answer, and Reply. A writ-appeal petition for review of a decision by a Court of Criminal Appeals acting on a petition for extraordinary relief shall be filed by an appellant, together with any available record, including the items specified in subsection (a)(2)(C), within the time prescribed by Rule 19(e), shall conform in length to Rule 24(b), shall be accompanied by proof of service on the appellee in accordance with Rule 39, and shall contain the information required by subsection (a)(2)(B). The appellee shall file an answer no later than 10 days after the filing of the writ-appeal petition. A reply may be filed by the appellant no later than 5 days after the filing of the appellee's answer. *See* Rules 28(b)(2) and (c)(2). Upon the filing of pleadings by the parties, the Court may grant or deny the writ-appeal petition or take such other action as the circumstances may require.

*The proposed change to Rule 27(b) would read:*

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### **(b) Writ-Appeal.**

(1) Writ-Appeal Petition, Answer, and Reply. A writ-appeal petition for review of a decision by a Court of Criminal Appeals acting on a petition for extraordinary relief shall be filed by an appellant, together with any available record, including the items specified in subsection (a)(2)(C), within the time prescribed by Rule 19(e). The petition must conform in length to Rule 24(b), shall be accompanied by proof of service on the appellee in accordance with Rule 39, and shall contain the information required by subsection (a)(2)(B). The appellee may file an answer no later than 10 days after the filing of the writ-appeal petition. A reply may be filed by the appellant no later than 5 days after the filing of the appellee's answer. *See* Rules 28(b)(2) and (c)(2).

(2) Priority Writ-Appeal for Article 6b(e) Writs. To the extent practicable, review of any decision of the Courts of Criminal Appeals on a petition for mandamus, pursuant to Article 6b(e)(3)(C), UCMJ, 10 USC § 806b(e)(3)(C), will have priority over all other proceedings before this Court.

Comment: Adding Rule 27(b)(2) is necessary to recognize that Article 6b(e) writs have priority as reflected in the Statute. The exact language of Article 6b(e)(3)(C),



UCMJ, 10 U.S.C. 806b is as follows, and has been incorporated into the rule above:

(C) Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces, as determined under the rules of the Court of Appeals for the Armed Forces. Art. 6b(e)(3)(C), UCMJ, 10 U.S.C. 806b.

### **Rule 36:**

*Rule 36 – Filing of Pleadings – currently reads:*

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(b) Filing in Person. If a pleading or other paper is filed in person, such filing shall consist of delivery to a member of the Clerk's office during normal business hours. *See* Rule 9(e).

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*The proposed change to Rule 36 would read:*

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(b) Filing in Person. If a pleading or other paper is filed in person, such filing shall consist of delivery pursuant to Rule 9(e).

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(f) Pro Se Filings. A pro se filing is a filing that is made by a person on his or her own behalf and that is not signed by at least one counsel who is participating in the case. *See* Rule 38(a). Pro se filings must include a statement indicating whether the filer is currently represented by designated military or other counsel. A person who is represented by counsel may make a pro se filing only if leave to file is granted by the Court for good cause shown. To establish good cause, a person who is represented by a counsel who has entered a notice of appearance must explain why representation by that counsel is inadequate. The Court and its employees cannot give legal help or advice to any person. A person making a pro se filing must follow all the Court's Rules of Practice and Procedure.

Comment: The ability for counsel and the accused party to file separate documents is unfair to the other side and, if a represented party can file separately, *Grosteferon* is rendered meaningless. Previously, the Court's rules have not defined pro se filings or put forth their limitations. While a person who is represented by counsel generally should not be permitted to file anything pro se, there may exist some

exceptions. The best way to handle the possibilities of exceptions is to require a person to seek leave to file pro se and to show good cause.

**Rule 37(b)(2):**

*Rule 37(b)(2) – Printing, Copying, and Style Requirements – currently reads:*

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**(b) Copying**

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(2) Except for electronically filed pleadings, an original and 7 legible copies of all pleadings or other papers relative to a case shall be filed. *See* Rule 35A concerning documents which contain classified information.

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*The proposed change to Rule 37(b)(2) would read:*

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**(b) Copying**

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(2) Except for electronically filed pleadings and audio and video recordings, an original and 7 legible copies of all pleadings or other documents relative to a case shall be filed. *See* Rule 35A concerning documents which contain classified information.

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Comment: This proposal reflects the changes needed to allow for the electronic filing of audio and video recordings.

**Rule 38(a):**

*Rule 38(a) – Signatures – currently reads:*

(a) General. Except for documents filed in propria persona and those provided for in subsection (b), all original pleadings or other papers filed in a case will bear the signature of at least one counsel who is a member of this Court's Bar and who is participating in the case. The name, address, telephone number, Court Bar number, and rank, if any, of the person signing, together with the capacity in which such counsel signs the paper, will be included. This signature will constitute a certificate that the

statements made in the pleading or paper are true and correct to the best of the counsel's knowledge, information, or belief, and that the pleading or paper is filed in good faith and not for the purpose of unnecessary delay. A counsel who signs a pleading "for" some other counsel whose name is typed under such signature must, in addition, affix their own signature in a separate signature block with their own name, address, telephone number, Court Bar number, and rank, if any, typed thereunder.

*The proposed change to Rule 38(a) would read:*

(a) General. Except for documents filed pro se and those provided for in subsection (b), all original pleadings or other papers filed in a case will bear the signature of at least one counsel who is a member of this Court's Bar and who is participating in the case. The name, address, telephone number, Court Bar number, and rank, if any, of the person signing, together with the capacity in which such counsel signs the paper, will be included. This signature will constitute a certificate that the statements made in the pleading or paper are true and correct to the best of the counsel's knowledge, information, or belief, and that the pleading or paper is filed in good faith and not for the purpose of unnecessary delay. A counsel who signs a pleading "for" some other counsel whose name is typed under such signature must, in addition, affix their own signature in a separate signature block with their own name, address, telephone number, Court Bar number, and rank, if any, typed thereunder. An electronic filing shall contain the digital signature of the attorney of record.

Comment: Rule 38 should be amended to include the guidance listed in paragraph 3(e) of the appendix regarding signatures in electronic filings.

**Rule 39(a):**

*Rule 39(a) – Signatures – currently reads:*

(a) In General. At or before the filing of any pleading or other paper relative to a case in the Clerk's office, a copy thereof shall be served on all counsel of record, including amicus curiae counsel, in person, by mail, by third-party commercial carrier, or by electronic means if the party being served consents. *See* Rule 16(b). When a party is not represented by counsel, service shall be made on such party in person, by mail, or by third-party commercial carrier. When reasonable, considering such factors as the immediacy of the relief sought, distance, and cost, service must be at least as expeditious as the manner used to file the pleading or other paper with the Court. *See* Rule 36.

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*The proposed change to Rule 39(a) would read:*

(a) In General. At or before the filing of any pleading or other paper relative to a case, a copy thereof shall be served on all counsel of record, including amicus curiae counsel, in person, by mail, by third-party commercial carrier, or by electronic means. When a party is not represented by counsel, service shall be made on such party in person, by mail, or by third-party commercial carrier. When reasonable, considering such factors as the immediacy of the relief sought, distance, and cost, service must be at least as expeditious as the manner used to file the pleading or other paper with the Court. *See* Rule 36.

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Comment: The advent of electronic filings renders a consent requirement unnecessary.

### **Guidelines for Electronic Filing of Pleadings:**

*The Guidelines for Electronic Filing of Pleadings currently reads:*

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e. The Joint Appendix to the brief will be filed in paper form only with the required number of paper copies rather than electronically. If the appellant or petitioner files the brief electronically, the Joint Appendix will be filed on the same day the brief is filed electronically.

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*The proposed change to the Guidelines for Electronic Filing of Pleadings would read:*

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e. The Joint Appendix to the brief, to include copies, will be filed in paper form only. Audio and video recordings are exempt from this paper requirement for the Joint Appendix to the brief. If the appellant or petitioner files the brief electronically, the Joint Appendix will be filed on the same day the brief is filed.

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Comment: Electronically filing audio and video recordings will allow for easier transmission and access to the recordings and explicitly stating the Court's policy will provide clarity to filers.

